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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1559~~. 1142

C. H. CUTHBERT, PLAINTIFF IN ERROR,

vs.

THE STATE OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED MAY 4, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, MAY 4, 1889.

1 VIRGINIA:

Pleas before the supreme court of appeals, held at the State court-house, in the city of Richmond, on Thursday, March 14th, 1889.

Be it remembered that heretofore, to wit, on the 23d day of February, 1889, came C. H. Cuthbert, by counsel, and presented a petition for a writ of error and supersedeas to a judgment rendered by the hustings court of the city of Petersburg, on the 5th of February, 1889; which petition, with the transcript of the record filed therewith, is as follows:

Petition.

To the honorable judges of the supreme court of appeals of Virginia:

Your petitioner, C. H. Cuthbert, would respectfully represent that he is aggrieved by a judgment pronounced against him by the hustings court of the city of Petersburg on the 5th day of February, 1889.

Your petitioner was prosecuted in said court under the act of May 23d, 1887, for selling the State's tax-receivable coupons without the special license required thereby. He defended upon the ground that said act is repugnant to section ten of article one of the Constitution of the United States, but said hustings court held said act valid, and your petitioner was convicted and fined $500. Notwithstanding that this court has held said act to be consistent with said Constitution in the case of Commonwealth *vs.* Maury, your petitioner ventures to pray that it will reconsider the conclusions to which it came in that case and determine said act to be repugnant to said Constitution. He therefore prays for a writ of error and supersedeas and a reversal of said judgment.

PETITIONER,
By his attorney, WM. L. ROYALL.

I, William L. Royall, counsel practicing in the supreme court of appeals of Virginia, am of opinion that the judgment complained of in the foregoing petition is erroneous and should be reversed.

WM. L. ROYALL.

2 Writ of error and supersedeas awarded. Bond required in penalty of $750.

February 23, 1889.

L. L. LEWIS.

To the clerk of the supreme court of appeals at Richmond.

VIRGINIA:

Pleas at the city of Petersburg, before the hustings court of the said city, continued by adjournment from day to day, and held at the court-house thereof, on Tuesday, the 5th day of February, in the year 1889.

Be it remembered that at this same term, to wit, at a hustings court held for the city of Petersburg, at the court-house thereof, on Thursday, the 17th day of January, in the year 1889, R. T. Arrington, Geo. H. Davis, Robert T. Meade, A. Rosenstock, W. H. Harrison, James D. Cooper, Ira P. Hoag, G. B. Eanes, Geo. W. Kirkham, B. H. Spiers, Thos. V. Collins, J. C. Blake, N. T. Patteson, W. L. Venable, John Y. Ford, Rich'd H. Stewart, Geo. W. Heath, Thos. E. Stroude, and J. B. Brady were sworn a grand jury of inquest for the body of this city; and, having received their charge, withdrew, and after some time spent in their room returned into court, and then the said grand jury were adjourned until to-morrow morning at 10 o'clock.

And at this same term, to wit, at a hustings court continued by adjournment, and held at the court-house thereof, on Friday, the 18th day of January, in the year 1889, the grand jury appeared according to their adjournment, were sent out of court, and after some time returned into court and made the following presentments:

STATE OF VIRGINIA, *City of Petersburg*, } *To wit:*

In the Hustings Court of said City.

The jurors of the Commonwealth of Virginia in and for the city of Petersburg, and now attending the said court, upon their oaths present that C. H. Cuthbert, on the first day of November, in the year one thousand eight hundred and eighty-eight, in said city and within the jurisdiction of said court, did unlawfully sell and offer to sell to divers persons, to wit, W. R. Nichols, B. D. Booth, W. M. Habliston, Alfred Friend, R. M. Dobie, John W. Bradbury, O. B. Morgan, W. T. Plummer, J. W. Young, and B. B. Vaughan, tax-receivable coupons from bonds of the State of Virginia, said coupons being then and there past-due coupons, without
3 having previously obtained a special license, as required by law, authorizing him, said C. H. Cuthbert, to sell and offer to sell such coupons, contrary to the provisions of the act of Assembly in such case made and provided and against the peace and dignity of the State of Virginia.

And the jurors aforesaid, upon their oaths aforesaid, do further present that the C. H. Cuthbert, on the first day of November, in the year one thousand eight hundred and eighty-eight, in said city and within the jurisdiction of said court, did unlawfully tender and pass and unlawfully offered to tender and pass to divers persons, to wit,

W. R. Nichols, B. D. Booth, W. M. Habliston, Alfred Friend, R. M. Dobie, John W. Bradbury, O. B. Morgan, W. T. Plummer, J. W. Young, and B. B. Vaughn, tax-receivable coupons from bonds of the State of Virginia, said coupons being then and there past-due coupons, without having previously obtained a special license, as required by law, authorizing him, said C. H. Cuthbert, to tender and pass and to offer to tender and pass such coupons, he, the said C. H. Cuthbert, then and there, in tendering and passing and in offering to tender and pass said coupons, as aforesaid, acting as the agent and broker for another person or persons to said jurors unknown, contrary to the provisions of the act of the General Assembly in such cases made and provided and against the peace and dignity of the Commonwealth of Virginia.

And the jurors aforesaid, upon their oaths aforesaid, do further present that the said C. H. Cuthbert did, on the first day of November, in the year one thousand eight hundred and eighty-eight, and had continuously from day to day, since first day of November, in the year one thousand eight hundred and eighty-eight, until the day of the finding of this presentment, in said city and within the jurisdiction of said court, unlawfully sold and offered to sell and unlawfully tendered and passed and unlawfully offered to tender and pass to divers persons, to wit, W. R. Nichols, B. D. Booth, W. M. Habliston, Alfred Friend, R. M. Dobie, John W. Bradbury, O. B. Morgan, W. T. Plummer, J. W. Young, and to divers other persons to said jurors unknown, tax-receivable coupons from the bonds of the State of Virginia, said coupons being then and there past-due coupons, without having previously obtained a special license, as required by law, authorizing him, said C. H. Cuthbert, to sell and offer to sell and to tender and pass and to offer to tender and pass such coupons, he, the said C. H. Cuthbert, then and there, in selling and offering to sell and in tendering and in passing and in offering to tender and pass said coupons, as aforesaid, acting as the agent and broker for another person or persons to said jurors unknown, contrary to the provisions of the act of General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Virginia.

And now, at this day, to wit, at a hustings court continued by adjournment and held at the court-house thereof, on Tuesday, the 5th day of February, in the year 1889, came the Commonwealth
4 of Virginia, by her attorney, and the defendant, C. H. Cuthbert, by his attorney, and on motion of the Commonwealth leave is given her to enter a *nolle prosequi* upon the first and second counts of the presentment, which is done; and thereupon it is ordered that the prosecution of the first and second counts of the presentment be ended and discontinued, but that the prosecution proceed upon the third count of the same.

And thereupon the defendant moved the court to quash the said third count upon the ground that the act of Assembly of May 23d, 1887, entitled "chapter 408 of An act to amend and re-enact section 65 of chapter 450 of the acts of 1883–'4, in relation to tax-receivable coupon brokers," under which the presentment was found, is repug-

nant to section 10 of article 1 of the Constitution of the United States; which motion the court overruled; and thereupon the defendant demurred to said third count upon the same ground, and the Commonwealth joined in said demurrer, and on consideration of the same the court overruled the said demurrer; and thereupon the defendant tendered to the court a special plea in writing, and the attorney for the Commonwealth demurred to the same, and the defendant joined in the said demurrer; and the matters of law arising upon said demurrer having been argued by counsel, the court sustains the Commonwealth's demurrer to said plea, and the said C. H. Cuthbert, being then required to plead to said third count of said presentment, pleaded not guilty to the same; and thereupon a jury, to wit, James E. Coldwell, W. W. Hudson, R. Yates Jones, F. L. Olivier, J. C. Birdsong, John T. Williams, D. L. Sturdivant, J. D. Watkins, J. T. Garrett, R. F. Chambers, M. W. Morton, and Jos. A. Boyd, were sworn the truth to speak on the issue joined, and, having heard the evidence, returned a verdict in these words: "We, the jury, find the defendant guilty as charged in the third count of the presentment, and assess his fine at five hundred dollars."

The defendant thereupon moved the court to set aside the said verdict on the ground that the same is contrary to the law, which motion the court overruled; whereupon it is considered by the court that the said C. H. Cuthbert make his fine to the Commonwealth by the payment of five hundred dollars, and that he pay the costs of this prosecution.

But the defendant stating his intention to apply for a writ of error to this judgment, it is ordered that execution of the same be suspended for the period of sixty days.

Special Plea Referred to in the Above Order.

And, for a plea in this behalf, the said defendant comes and says that for many years he has been engaged in business in the city of Petersburg as agent for certain foreign insurance companies, and that on the first day of November, 1888, and always thereafter until now, when he sold and offered to sell and tendered and passed and offered to tender and pass for another the tax-receivable coupons from bonds of the State of Virginia, as charged in said third count of the presentment, he owed the said State no license taxes upon any business of any kind whatever. Defendant further avers that the coupons which he sold and offered to sell and tendered and passed and offered to tender and pass for another, as charged in the said third count, were cut from bonds issued by the State of Virginia, were overdue, and bore upon their faces the contract of said State that they should be received in payment of all taxes, debts, and demands due to said State, and he claims that the act of Assembly under which he is prosecuted is repugnant to section 10 of article 1 of the Constitution of the United States so far as it applies to him; and this he is ready to verify.

WM. L. ROYALL,
Att'y for Defendant.

Memorandum.

During the progress of the trial of this cause the defendant excepted to two decisions of the court given against him, and tendered his two bills of exceptions, which were received, signed, and sealed by the court and made parts of the record hereof; which bills of exception are in the words and figures following, to wit:

Be it remembered that on the trial of this case the same was submitted to the jury upon the following agreed statement of facts: It is agreed that on the first day of November, 1888, the defendant sold and offered to sell and tendered and passed and offered to tender and pass for another, as charged in the presentment's third count, tax-receivable coupons from bonds of the State — Virginia, which were overdue and bore upon their face the contract of said State that they should be received in payment of all taxes, debts, and demands due said State to tax-payers owing taxes to said State; and it is further agreed that he did not have the special license therefor provided for and required by the act of May 23rd, 1887, under which this presentment is found, and that he had not paid the special license tax provided for by said act, of $1,000, for the privilege of selling the same, nor has he paid to the State the tax of twenty per centum upon the face value of the same. It is further agreed that the defendant has been for a number of years a member of the firm of Cuthbert & Sons, doing business in the city of Petersburg as insurance agents, and on the first day of November, 1888, and always thereafter until now, they represented, and for months before had represented, as agents for same, the following foreign insurance companies, to wit: Mutual Life Insurance Company of New York, United States Mutual Accident Association, Royal Insurance Company of Liverpool, Phœnix Company of Brooklyn, New York; Westchester Fire Insurance Company of New York, Hamburg-Bremen Insurance Company of Bremen, Germany; Glenn Falls Insurance Company of New York, Northern Assurance Company of London, Western Assurance Company of Toronto, Sun Fire Insurance Company of London, and that on the first day of November, 1888, and always thereafter until now, all of said in-
6 surance companies had paid to the State of Virginia all license taxes assessed them by said State. It is further agreed that the defendant was not engaged on the first day of November, 1888, in any business upon which a license tax is charged by said State, except the business of selling tax-receivable coupons from bonds of said State, nor has he been so engaged since November 1st, 1888.

Thereupon the defendant moved the court to instruct the jury as follows:

The jury are instructed that the act of Assembly approved May 23d, 1887, entitled an "Act to amend and re-enact section 65 of chapter 450 of the acts of 1883–'4, in relation to tax-receivable coupon brokers," under which the presentment in this case is found,

is repugnant to section 10 of article 1 of the Constitution of the United States, and therefore void, and they must acquit the accused.

Which instruction the court refused to give, but instructed the jury that said act is not repugnant to said Constitution; to both of which actions of the court the defendant then and there excepted, and tendered this his first bill of exceptions, which is signed, sealed and enrolled.

D. M. BERNARD. [SEAL.]

Second Bill of Exceptions.

Be it remembered that after the jury had rendered their verdict in this cause the defendant moved the court to set the same aside upon the ground that the act of Assembly under which this presentment is found is repugnant to section 10 of article 1 of the Constitution of the United States; but the court overruled said motion, and the defendant then and there excepted to the action of the court, and tendered this his second bill of exceptions, which is signed, sealed and enrolled.

D. M. BERNARD. [SEAL.]

STATE OF VIRGINIA, *City of Petersburg,* } *To wit:*

I, Robert Gilliam, clerk of the hustings court of the city of Petersburg, in the State of Virginia, do hereby certify that the foregoing is a true transcript from the records of the said court.

Given under my hand this 14th day of February, 1889.

RO. GILLIAM, *Clerk.*

Clerk's fee for copy of record, $2.75.

A copy.

Teste: GEO. K. TAYLOR, *C. C.*

7 And now, at this day, to wit, at a supreme court of appeals held at the State court-house, in the city of Richmond, on Thursday, March 14th, 1889.

This day came again as well the plaintiff in error, by his counsel, as the attorney general, on behalf of the Commonwealth; and the court, having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the said judgment. It is therefore considered by the court that the said judgment be affirmed, and that the Commonwealth recover against the plaintiff in error damages according to law, and also her costs by her about her defence herein expended, which is ordered to be certified to the said hustings court of the city of Petersburg.

The following is a copy of the opinion of the court:

Opinion.

8 The petitioner was convicted of the offence of unlawfully selling coupons cut from the bonds of the State of Virginia without having first obtained the license therefor required by law.

The propriety of this conviction depends upon the question of the constitutionality of the act of Assembly imposing a tax upon the business of a coupon broker. See sec. 65, ch. 450, Acts 1883–'4, p. 490.

In the case of Commonwealth *v.* Maury, reported in 82 Va. Reports, p. 882, this precise question was submitted to this court and determined in favor of the constitutionality of that act, and the reasons for that decision are fully stated in the opinion of Richardson, J., speaking for the court, in that case.

We are now asked, without the citation of a single additional authority or the presentation of a new reason, to reverse that deliberate decision. This we cannot do. The State has, in our
9 opinion, the power to tax the business of a coupon broker just as it has the right to tax persons engaged in other avocations within its jurisdiction.

The case is therefore ruled by the case of Commonwealth *v.* Maury, *supra*, and the judgment of the hustings court of the city of Petersburg must be affirmed.

A true transcript of the record.

Teste: GEO. K. TAYLOR, *C. C.*

The fee of the clerk of sup. court of appeals for this transcrip- is $3.75.

STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the foregoing — transcript of the record and proceedings lately pending in said court, wherein C. H. Cuthbert was plaintiff in error and The Commonwealth
10 of Virginia was defendant *was defendant* in error.

Seal Supreme Court of Appeals of Virginia, Richmond.

In testimony whereof I hereto set my hand and annex the seal of said court this 3d day of April, 1889.

GEO. K. TAYLOR,
Clerk Supreme Court of Appeals of Virginia, at Richmond.

11 CUTHBERT *v.* THE STATE OF VIRGINIA.

Assignment of Errors.

The plaintiff in error makes the following assignment of errors:

1st. The action of the hustings court of the city of Petersburg, as affirmed by the supreme court of appeals, in overruling his demurrer to the indictment.

2nd. The action of said court in refusing to quash the indictment.

3rd. The action of said court in sustaining the State's demurrer to his plea.

4th. The refusal of the court to set aside the verdict.

5th. The refusal of the court to instruct the jury that they must acquit the accused.

WM. L. ROYALL, *P. D.*

12 To the Hon. M. W. Fuller, Chief Justice of the Supreme Court of the United States:

Your petitioner, C. H. Cuthbert, respectfully shows that he is aggrieved by a judgment of the supreme court of appeals of the State of Virginia entered on the 14th day of March, 1889. He presents herewith a copy of the record of said judgment, which shows the following case:

Your petitioner was indicted in the corporation court of the city of Petersburg, under the provisions of an act of Assembly of said State, for selling the said State's overdue tax-receivable coupons without first having paid to her a special license tax of $1,000, as provided for by said act. He defended upon the ground that said act was repugnant to the Constitution of the United States; but said corporation court held the said act to be valid, and upon a
13 writ of the supreme court of appeals of said State affirmed that ruling. Your petitioner was convicted and fined $500, and this conviction was affirmed by said supreme court of appeals. Your petitioner therefore prays that a writ of error to said judgment may be allowed him, and that said judgment may be reversed.

Petitions by his att'y, WM. L. ROYALL.

14 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the supreme court of appeals of the State of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between C. H. Cuthbert, plaintiff in error, and The State of Virginia, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty
15 or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemp-

tion specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the twenty-eighth day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
M. W. FULLER,
Chief Justice.

16 I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that a copy of the within writ is on file in my office.

Given under my hand this 3d April, 1889.

GEO. K. TAYLOR,
Clerk Supreme Court of Appeals of Virginia, at Richmond.

17 The United States of America to the State of Virginia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of the State of Virginia, wherein C. H. Cuthbert is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twenty-eighth day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

MELVILLE W. FULLER,
Chief Justice.

18 On this — day of ——, in the year of our Lord one thousand eight hundred and eighty-—, personally appeared

—— —— before me, the subscriber, —— ——, and makes oath that he delivered a true copy of the within citation to —— ——.

—— ——.

Sworn to and subscribed the — ——, A. D. 188–.

—— ——.

Legal service of the within citation is hereby acknowledged for the State of Virginia.

R. A. AYERS,
Per P.,
Att'y Gen'l.

March 30th, 1889.

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that a copy of the within citation is on file in my office.

Given under my hand this 3d April, 1889.

GEO. K. TAYLOR,
Clerk Supreme Court of Appeals of Virginia, at Richmond.

19 Know all men by these presents that we, Wm. L. Royall and A. B. Guigon, are held and firmly bound unto the State of Virginia in the full and just sum of five hundred dollars, to be paid to the said State, — certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 25th day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at a supreme court of appeals of the State of Virginia, in a suit depending in said court between said State and C. H. Cuthbert, a judgment was rendered against the said Cuthbert, and the said Cuthbert having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation, directed to the said State of Virginia, citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Cuthbert shall prosecute said suit to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

20 Sealed and delivered in presence of—

WM. L. ROYALL. [SEAL.]
A. B. GUIGON. [SEAL.]
—— ——. [SEAL.]

Approved by—
M. W. FULLER,
Ch. Justice.

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the foregoing is a true copy, the original of which is filed in my office.

Given under my hand this 3d April, 1889.

GEO. K. TAYLOR,

Clerk Supreme Court of Appeals of Virginia, at Richmond.

Endorsed on cover: Virginia supreme court of appeals. No. 1559. C. H. Cuthbert, plaintiff in error, *vs.* The State of Virginia. Filed May 4, 1889.

SUPREME COURT, U. S.
FILED.
OCT 16 1889
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1889.

C. H. CUTHBERT,
Plaintiff in Error,
vs.
THE STATE OF VIRGINIA.

No. 1142.

BRIEF FOR PLAINTIFFS IN ERROR.

D. H. CHAMBERLAIN,
Counsel for Plaintiffs in Error.

Supreme Court of the United States.

OCTOBER TERM, 1889.

C. H. CUTHBERT,
Plaintiff in Error,

vs.

STATE OF VIRGINIA.

No. 1142.

Brief for Plaintiff in Error.

In this case, the plaintiff in error was indicted in the Hustings Court, for the City of Petersburg, Va., for unlawfully selling and offering to sell, and unlawfully tendering and passing, and unlawfully offering to tender and to pass, tax receivable coupons of the bonds of the State of Virginia.

The defendant moved to quash the indictment on the ground that the act under which he was indicted—Act of May 23, 1887—was repugnant to Section Ten of Article One of the constitution.

This motion was overruled, and also a demurrer upon the same ground.

Thereupon, the plaintiff in error tendered a special plea in writing, setting forth that he owed the State no license taxes except such as were demanded under said Act of May 23d, 1887, and that the coupons which he offered to sell were coupons from the tax-receivable bonds of the State, and claiming that the Act under which he was prosecuted was repugnant to the constitution. The Court held said act to be valid and upon the trial the jury returned a verdict of guilty.

The plaintiff in error moved to set aside the verdict upon the same grounds as above, which motion the Court overruled.

The plaintiff in error on the trial further raised the question of the validity of the Act of May 22, 1887, by moving the Court to instruct the jury that said Act was repugnant to the constitution, "which instruction the Court refused to give, but instructed the jury that said act is not repugnant to the constitution; to both of which actions of the Court the defendant then and there excepted."

(*Record*, fol. 6.)

The plaintiff in error thereupon carried the case to the Supreme Court of Appeals of the State, where judgment was rendered affirming the rulings and judgment below.

The act under which the present case arises is as follows:

"CHAP. 408.—AN ACT to amend and re-enact Section sixty-five of Chapter four hundred and fifty of the Acts of 1883-'4 in relation to tax-receivable coupon brokers.

Approved May 23, 1887.

1.—Be it enacted by the General Assembly of Virginia, that Section sixty-five of Chapter four hundred and

fifty of the Acts of Assembly, session of eighteen hundred and eighty-three and eighty-four, which was approved March fifteenth, eighteen hundred and eighty-four, be amended and re-enacted so as to read as follows:

§ 65. No person shall sell or offer to sell tax-receivable coupons from bonds of the State of Virginia, in any county, city or town of this commonwealth, or tender, pass, or offer to tender or pass, for another, any such coupons without a special license therefor, for which he shall pay one thousand dollars for the privilege of selling or offering to sell the same in each county, city or town of over ten thousand inhabitants; and under ten thousand inhabitants five hundred dollars within this commonwealth. The person obtaining such special license shall have the privilege only of selling or offering to sell, tendering and passing such tax-receivable coupons to taxpayers residing or owning property subject to taxation within the county, city or town in which such license is obtained; and in addition thereto, he shall pay to the State a tax of twenty per centum upon the face value of all tax-receivable coupons sold by him. At the time of making such sales he shall give to the purchaser a printed certificate, signed by him stating the fact that he has sold coupons to the purchaser, naming him. The said certificate shall also contain the number and amounts of the said coupons and the date of sale. Whenever such coupons are tendered for taxes, the broker's certificate shall be delivered to the collector. The said collector shall preserve the same until the first day of the following month, when he shall collect the same tax of twenty per centum from the said broker. Such special license to be obtained as other licenses are obtained under this chapter. And any person violating this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined, at the discretion of a jury, not less than five hundred nor more than two thousand dollars. Any prosecution under this act may be maintained either in the county or corporation in which such coupon broker or other person resides, or in which the taxpayer resides, to whom such sale or offer of sale was made. But any stock broker may purchase said coupons for the purpose

of funding them in new three per centum bonds of Virginia.

2. This act shall be in force from its passage."

I.

The precise language of the statute here is (1) "No person shall sell or offer to sell," &c.; and (2) no person shall "tender, pass, or offer to tender or pass *for another*," &c., without a special license therefor, &c.

(1.) The effect of the first provision is to make it necessary for *every person who wishes to sell a single coupon* to pay a license fee of $1,000 for each town, city or county of over 10,000 inhabitants, and under 10,000 inhabitants, $500—the privilege being limited to the sale of coupons to taxpayers residing or owning taxable property in the town, city or county where the license is obtained.

(2) In addition to this, he is required to "pay to the State a tax of twenty per centum on the face value of all tax-receivable coupons sold by him."

From this it results (1) that a person holding coupons must pay a license tax of $1,000 or $500 in order to sell a single coupon in any town, city or county; (2) that if he wishes to sell in more than one town, city or county, he must pay the same license fee in each town, city or county, and (3) that he can then only sell to actual taxpayers, residing or owning taxable property in each town, etc., in which he sells, and (4) that he must in addition to this, pay twenty per cent. of the *face value* of the coupon to the State.

Now it cannot be the subject of argument even, that

these terms are in most cases absolutely prohibitive of the sale of coupons *by their owners* or by any one, except possibly those who might as brokers or persons engaged in the business of selling coupons, have a sufficiently large number for sale to make the payment of these amounts possible.

It can admit of no doubt that for all practical purposes, this Act *prohibits the sale of coupons*, under the penalties named in the Act ; that is to say, imposes such terms for the right to sell as to make it impossible for any person, except in very exceptional circumstances, to sell coupons at all, even to taxpayers or owners of taxable property in the cities, towns or counties where licenses are obtained, and as to all other sales, or sales to any other persons, *the act absolutely prohibits such sales.*

The act may be accurately paraphrased thus: No person shall himself sell or cause to be sold or transferred a tax-receivable coupon, except that upon payment of license fees of $1,000 or $500 for each county, city or town in the State, and upon payment of the additional sum of twenty per cent. of the face value of such coupon, he may sell and transfer such coupon, but only to taxpayers residing or owning taxable property in the particular county, city or town where he sells or offers to sell it.

All sales of coupons to *others than taxpayers or owners* of taxable property in the localities covered by the licenses, are thus wholly prohibited.

That this a violation of the coupon contract is clear.

When the State issued the coupons, she gave them the usual qualities of coupons ; among these, the right of the holder to cut them from the bonds and to treat them as separate and independent instruments, with the right of the holder to use, sell or otherwise employ

them, subject to no burdens not borne by other property or similar instruments.

It will be seen that the act here applies only to *tax-receivable coupons*. It is a special burden and restriction put on them alone.

So far, then, as the act restricts and forbids the sale of coupons, or in any manner essentially restricts and injuriously burdens the usual uses and rights of coupons, it is manifestly void.

II.

The act has also a second effect--it imposes the same burden upon those who may "tender, pass, or offer to tender or pass *for another*."

Is this feature less obnoxious than the former?

We answer that the coupon contract, as above defined, contemplated the use of the coupons, in all respects and in all ways, without any special restrictions or burdens not common to like or similar instruments or property. It especially contemplated the free transfer of the coupons according to their ordinary legal qualities, like other coupons, either by the owner's own direct acts, or by the authority given by the owner to his agents, attorneys or other legal representatives. It is inconceivable that any one—State or creditor—ever had in mind that these coupons could be restricted to a sale or transfer or tender by the owner's personal act, or that their sale, transfer or tender could be clogged or burdened by special conditions or restrictions, which, by limiting their transfer to the owner's personal act,

should impair their value for the purposes for which they were issued.

No one disputes the power of the State to tax occupations, or the different kinds of business carried on by her citizens, provided such tax does not violate some constitutional provision. The business, for example, of a broker, may be taxed by a license. If the broker sells tax-receivable coupons, it will only subject that part of his business to the same burden as is imposed on the other elements of his business.

But the tax here, as we have shown, is a tax on the sale, transfer, tender, &c., of *coupons alone.*

In view of the record which shows that the plaintiff in error owed no license tax whatever, except what was demanded by this act, it is clear that his indictment, as well as his conviction for violation of the act in question, was unwarranted in law, and that the act under which the indictment and conviction proceeded was unconstitutional and void.

If the State may lay a special tax on the sale or transfer of her tax-receivable coupons, she may make that tax of what amount she pleases, and thus she may do, what she has fallen little short of doing, or attempting to do, by this act, viz., to prohibit the circulation of the coupons, and limiting their use to those in whose hands they may be when they mature, or of those who may own the bonds to which they originally belonged.

We do not see one argument, ground or consideration which can save the present act from condemnation, if any legal force or pecuniary value is to be accorded to the coupon contract.

But not only does the present act impose a special, onerous and injurious burden on the coupons, it also,

as we have seen, prohibits, under the penalties named in the act, all sales or transfers to any persons except taxpayers or persons holding taxable property in Virginia. The coupon-holder cannot sell under any conditions to a coupon-broker, for example, or to any one dealing in coupons, or otherwise dispose of them, except directly to taxpayers.

What suggestion can be offered in support of the validity of such an act?

D. H. CHAMBERLAIN,
Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
OCT 21 1889
JAMES H. McKENNEY,
CLERK.

IN THE
Supreme Court of United States.

CUTHBERT
vs.
THE STATE OF VIRGINIA, } No. 1142.

In error to the Supreme Court of Appeals of Virginia.

BRIEF OF R. A. AYERS, ATTORNEY-GENERAL OF VIRGINIA, AND J. RANDOLPH TUCKER, FOR THE STATE OF VIRGINIA.

The plaintiff in error was convicted for selling tax-receivable coupons without a license as a broker. The law imposed a license tax on the business. He defended himself on the simple ground that Virginia could not tax the business of a broker of such coupons. He was convicted. The court of appeals of Virginia, under its former decision of Commonwealth *vs.* Maury, 82 Va., 882, affirmed the judgment. The following reasons were given by the court for its decision:

"The history of the State debt of Virginia, and of the legislation attempting its settlement, and of the action of the State and federal courts touching that legislation, are matters of well known judicial cognizance, and need not be repeated. Suffice it to say, that before the civil war the State issued bonds to a large amount, the interest on which was promptly paid. After the war, from causes well understood, the interest payments ceased, or became irregular,

and have remained in a condition of harassing uncertainty. During the war, and against Virginia's consent, the old Commonwealth was dismembered, and a portion of her territory erected into the new State of West Virginia, which, in common justice should have assumed its portion of the debt, but did not. So, the State of Virginia, by an act of her legislature passed March 30, 1871, undertook a separate adjustment with her creditors. This act is known as "the Funding Bill of 1871." It is provided that the holders of the bonds of the State might fund two-thirds thereof in six per cent. coupons or registered bonds of the State, to run for thirty-four years, payable, like the coupons, to the bearer.

The coupons were payable semi-annually, and receivable, at and after maturity, for all taxes, debts, dues and demands due the State; and this was so expressed on their face. But it must be remembered that in issuing said bonds and coupons, the legislature, neither in terms nor by any just inference, made *any contract* that the bonds and coupons should not be subject to taxation as other property taxed by the State.

Under said funding act of 1871, a number of creditors surrendered their old bonds and took new bonds with coupons attached. It was held by this court in Antoni *vs.* Wright, 22 Gratt., 833, that thereby a contract was formed which was irrepealable, without the consent of both parties, and made it obligatory on the State to receive the coupons for their full amount from the bearer of any taxes, debts, dues and demands due to the State, it being considered that such receivability constituted their chief value. But this court did not there hold, nor has the supreme court of the United States, any where, or at any time, held that thereby was created any contract, expressed or implied, that the State should not tax the bonds or the coupons as she taxed other property.

In 1876, the legislature passed an act imposing a tax on *the bonds*, and requiring that tax to be deducted from the *coupons*, when tendered by parties other than the holders of the bonds, in payment of their taxes or other dues to the State. And this act was held by the supreme court of the United States in the case of Hartman *vs.* Greenhow, 102 U. S., 672, to be unconstitutional. But, we repeat, that court did not decide, directly or indirectly, that the State had surrendered its right to tax either the bonds or the coupons.

Nevertheless, for the defendant in error, it is contended that that

court, in that case, decided that the State could not tax the coupons; that they were a non-taxable article, and that it had repeatedly decided that the tax on the business of selling an article is a tax on the article itself. Citing Welton *vs.* State of Missouri, 1 Otto, 275; Webber *vs.* Virginia, 13 Otto, 350, and from these and like decisions, assuming that taxing the business of selling the coupons is a tax on the coupons themselves, therefore the State cannot tax the business of selling them.

If the premise was correct, the conclusion would also be correct. The premise, however, is not correct. That court did not decide that the State could not tax the coupons. A brief examination of Hartman *vs.* Greenhow will demonstate the accuracy of our position. That case arose under the said act of 1876. The decision amounted to this and nothing more: "That the Virginia act of 1876, requiring the tax on the bonds issued under the funding act of 1871, *to be deducted from the coupons* originally attached to them, when tendered in payment of taxes or other dues to the State, *cannot be applied* to coupons separated from the bonds, and *held by different owners*, without impairing the contract with *such* bondholders, contained in funding act, and the contract with the bearer of the coupons." See 102 U. S., page 685.

So far was the supreme court of the United States from deciding that the State could not impose a tax on the bonds, or on the coupons, that it expressly declined so to decide. In that case, at page 683 (102 U. S.), the court says: "The power of the State to impose a tax on her own obligations is a subject upon which there has been a difference of opinion among jurists and statesmen. * * * In the case of Murray *vs.* Charleston, 90 U. S., 432, there are many pertinent and just observations on this subject, which it is not material to repeat, for *the question* is *not* necessarily involved in the case before us." And in the case referred to, at page 445, the supreme court, *per* Mr. Justice Stong, said: "Is, then, property, which consists in the promise of a State, or of a municipality of a State, beyond the reach of taxation? We do not affirm that it is. A State may undoubtedly tax any of its creditors within its jurisdiction for the debt due to him, and regulate the amount of the tax by the rate of interest the debt bears, if its promise remains untouched. A tax thus laid impairs no obligation assumed. It leaves the contract untouched."

This language of the supreme court is of no doubtful import, nor

can it be strained from its one plain meaning. Certainly, then, it cannot be successfully contended that, in either Murray *vs.* Charleston or Hartman *vs.* Greenhow, it was held that the State cannot put a tax on her obligations—either a direct tax or an indirect tax, by taxing the business of selling those obligations. And it is safe to predict that no such decision can, or will ever, be made, except in instances where the State attempts to impose a tax on property beyond her jurisdictional limits, or where the State has expressly or impliedly contracted not to impose such a tax. Because, it is settled doctrine that the power of taxation, being vast in its character and searching in its extent, embraces necessarily all subjects within the jurisdictional limits of the State; and that these subjects of taxation are persons, property and business. As applied to them, the power of taxation may be exercised in a variety of ways, and may touch property in every shape, and business in the almost infinite variety of forms in which it is conducted, in professions, in commerce, in manufacture, and in transportation. And unless restrained by some provision of the Federal Constitution, the power of the State, as to the mode, form and extent of taxation, is unlimited, where the subjects to which it applies are within its jurisdiction. See Cleveland Railroad Co. *vs.* Pennsylvania, 15 Wall., 320.

In a word, then, the power of taxation is a part of the legislative sovereignty of the State. It existed when the bonds and coupons were issued, they having, in fact, been issued subject to this power of taxation, which was not in any way released or surrendered by their issuance, and being the *lex temporis*, is part and parcel of the bond and coupon contract. If this power of taxation was not expressly reserved, it matters not. For, it need not be reserved; it exists and remains always, unless yielded up. See Cooley on Taxation, 54, note 2.

Then, what though the tax imposed on the business of selling the coupons be a tax on the coupons themselves. The State is entitled to tax all persons, property and business within its jurisdiction. The business is done, or proposed to be done here, within the jurisdiction of the State; and that business is a legitimate subject of taxation. How, then, can it be said that the statute of 1883–4, which imposes a tax on the doing of the business of selling the coupons, is beyond the limits of the constitutional legislative powers of the State and void?

We have carefully examined all the authorities cited in support

of the positions contended for by the defendant in error, as well those cited by his counsel as those cited by the learned judge of the hustings court in his printed opinion, reported in the Virginia Law Journal, 1884, p. 394; and we can find nothing in them to sustain the decision of the court below; which decision has for its sole foundation the unwarranted and erroneous assumption that the State is without power to tax the coupons.

True it is, that these authorities do establish the proposition that a tax on the business of selling an article is a tax on the article itself, and that, therefore, a tax imposed on the sale of a *non-taxable* article is unconstitutional and void. But that proposition is not denied. In fact, it is a *concessum* in this opinion and is perfectly consistent with the views herein presented and with the conclusion arrived at.

For these reasons, this court is of opinion that the statute of 1883–4, under which the indictment in this case was found, is constitutional and valid, and that the judgment of the hustings court, quashing that indictment is erroneous, and must be reversed and annulled, and the case remanded to said court for further proceedings in conformity with the law and the views herein expressed."

The only question is, whether the business of a broker in these coupons is beyond the reach of a license-tax by the State, because coupons are receivable for taxes? Does the license-tax impair the obligation of the contract to receive coupons for taxes? If it does not, the judgment is right."

Respectfully submitted,

J. R. TUCKER,
R. A. AYERS, *Att'y-Gen.*,
For State of Virginia.

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FILED
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JAMES. H. McKENNEY.
CLERK

Supreme Court of the United States.

C. H. CUTHBERT
vs.
THE STATE OF VIRGINIA. } No. 1,142.

BRIEF FOR PLAINTIFF IN ERROR.

Supreme Court of the United States.

C. H. CUTHBERT
vs.
THE STATE OF VIRGINIA. } No. 1,142.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

An act of the Virginia Legislature, approved May 23, 1887, amendatory of a preceding one, provides that no person shall sell or offer to sell the State's tax-receivable coupons, or tender, or pass, or offer to tender or pass for another, such coupons without first paying a special license-tax of $1,000 in each county, city, or town where he proposes to do such act, and, in addition thereto, a tax of twenty per cent. of the face value of the coupons handled. For every violation of the act the offender is to be fined not less than $500 nor more than $2,000. But any stock-broker may purchase such coupons to fund into Virginia's new three per cent. bonds without paying the tax.

The plaintiff in error was indicted in the Corporation Court of the city of Petersburg, under this act, for doing the acts forbidden without having paid the license-tax.

At the trial he moved to quash the indictment, upon the ground that the act under which it was found was repugnant to the Constitution of the United States, which motion the court overruled. He demurred to the indictment upon the same ground, but the court overruled his demurrer. He then offered a special plea (record, page 4,) that when he did the acts alleged he owed the State no license-tax upon any business whatever, and he claimed that the act under which he was prosecuted was repugnant to the Constitution of the United States. The State demurred to this plea and the court sustained her demurrer. He then pleaded "not guilty," and the cause was tried upon an agreed statement of facts, which showed that the plaintiff in error had done the acts charged, and that he did not have the license required by said

act, and had not paid the license-tax imposed by it. It showed further that he had long been agent in Petersburg for a number of foreign insurance companies, which companies had paid the State all taxes imposed upon them, and that he owed the State no taxes on any business, unless he owed under the act under which he was prosecuted. He then moved the court to instruct the jury that the act under which he was prosecuted was repugnant to the Constitution of the United States, but the court refused to so instruct the jury, but on the contrary it instructed the jury that said act was valid, to both of which actions the defendant excepted. He was convicted and fined $500. He sued out a writ of error from the Supreme Court of Appeals of Virginia, which affirmed the judgment, and he then brought his case here. The assignments of error are at pages 7 and 8 of the record. All raise the same question—to wit, the validity of the act. The following is the act:

CHAP. 408.—An ACT to amend and re-enact section sixty-five of chapter four hundred and fifty of the Acts of 1883–'4, in relation to tax-receivable coupon brokers.

Approved May 23, 1887.

1. Be it enacted by the General Assembly of Virginia, That section sixty-five of chapter four hundred and fifty of the Acts of Assembly, session of eighteen hundred and eighty-three and eighty-four, which was approved March fifteenth, eighteen hundred and eighty-four, be amended and re-enacted so as to read as follows:

§65. No person shall sell or offer to sell tax-receivable coupons from bonds of the State of Virginia in any county, city, or town of this Commonwealth, or tender, pass, or offer to tender or pass for another, any such coupons, without a special license therefor, for which he shall pay one thousand dollars for the privilege of selling or offering to sell the same in each county, city, or town of over ten thousand inhabitants; and under ten thousand inhabitants, five hundred dollars, within this Commonwealth. The person obtaining such special license shall have the privilege only of selling or offering to sell, tendering and passing such tax-receivable coupons to tax-payers residing or owning property subject to taxation within the county, city, or town in which such license is obtained; and in addition thereto, he shall pay to the State a tax of twenty per centum upon the face value of all tax-receivable coupons sold by him. At the time of making such sales he shall give to the purchaser a printed certificate, signed by him, stating the fact that he has sold such coupons to the purchaser, naming him. The said certificate shall also contain the number and amounts of the said coupons and the date of sale. Whenever such coupons are tendered for taxes, the broker's certificate shall be delivered to the collector. The said collector shall preserve the same until the first day of the following month, when he shall collect the same tax of twenty per centum from the said broker. Such special license to be obtained as other licenses are obtained under this chapter. And any person violating this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined, at the discretion of a jury, not less than five hundred nor more than two thousand dollars. Any prosecution under this act may be maintained either in the county or corporation in which such coupon broker or other person resides, or in which the tax-payer resides, to whom such sale or offer of sale was made. But any stock broker may purchase said coupons for the purpose of funding them in new three per centum bonds of Virginia.

2. This act shall be in force from its passage.

ARGUMENT.

The 15th section of Virginia's new funding act, sufficiently described and characterized by this court in *Poindexter* vs. *Greenhow*, 114 U. S. R., at pages 305–6, Acts 1881–'2, p. 88, provides that—

"From and after the passage of this act, no bonds, certificates, or other evidences of indebtedness, shall be issued for any portion of the debt of this State; *nor shall any interest be paid upon any part or portion of said debt, except as hereinbefore provided.*"

As the State's officers are expressly forbidden by this act to pay these coupons, the bondholders must sell them to Virginia's tax-payers, or consent to have them perish on their hands.

Now, it will be observed that the act, after forbidding payment of the coupon, forbids, also, *even the owner of the bond* to sell his coupons to one of the State's tax-payers. I pass this fact by, however, because I know that the stress of the State's case is put upon the fact that it also forbids parties to do certain things *for another*. It does not forbid one person to *sell* for another, but it forbids one *to tender, or pass, or offer to tender or pass* coupons for another. But I admit, for the purposes of the case, that there is no difference between the two cases, and that if the State may lawfully forbid one to *tender* for another, she may lawfully forbid him to *sell* for another. *Tendering* for another is just as essential to successfully using the coupon as *selling* for another.

I suppose no one would contend that the State may lawfully forbid her officers to pay the coupon at maturity, and may also lawfully forbid the bondholder *himself* to sell it to one of her tax-payers, or to tender it for one. But if she has no power to forbid the bondholder himself to sell his coupon, or to tender it for a tax-payer, it is difficult to perceive upon what ground she can forbid *another* to sell it for him, or to tender it for a tax-payer. Whatever a man may lawfully do for himself he may equally authorize another to do for him.

The whole matter comes down to this. The purpose of the parties in entering into this contract was this: The State said "If I don't pay your coupon when it comes due, you may col-

lect your money by selling it to my tax-payer, who shall have perfect freedom in its use, either by himself or by an agent, if that be more convenient." The bondholder said "On that understanding I will fund." This agreement, of course, implied that if the bondholder were put to the necessity of selling, he should have a perfectly free and unobstructed course. The State could not have reserved a right to interfere in any way whatever with his freedom of sale and the freedom of the tax-payer in using the coupon for his taxes, either in person or by agent.

Now, I do not at all contend that a person doing a general business may claim exemption from license-taxes because he sells the State's coupons. Not at all. If he does a general business he must pay his license-tax on that business, notwithstanding the fact that he also sells or tenders coupons. What I contend for is this: if he confines himself to the business of selling or tendering coupons, and does no other business, then he may do that business free from the State's taxation. This must be so, or the State may effectually destroy her coupons. She may forbid her officers to pay them, and there can be no collection of them, and, if she can tax the sale or tendering of them at all she may tax it as much as she pleases, and thus absolutely prohibit her tax-payers from getting them to pay their taxes with. Indeed, the act under consideration is an absolute prohibition. To say nothing of the license-tax of $1,000 for each county, it requires the seller or tenderer to pay, in addition, twenty per cent. of the face value of the coupons sold or tendered. She has depreciated her coupons to eighteen cents on the dollar, so that a seller or tenderer would be out of pocket $1,000 for each of her one hundred counties, and twenty per cent. net on the face value of each coupon sold or tendered.

The record shows that the plaintiff in error does no business upon which a tax is assessed, and that the insurance companies which he represents had paid all taxes due by them.

WM. L. ROYALL,
for Pl'ff in Error.

61538

IN THE

Supreme Court of the United States.

No. 1216.

THOMAS E. HUCLESS *vs.* JOHN K. CHILDREY.

BRIEF OF WILLIAM L. ROYALL, FOR PLAINTIFF IN ERROR.

WM. L. ROYALL,
For Pl'tff in Error.

JUDD & DETWEILER, PRINTERS.

IN THE

Supreme Court of the United States.

No. 1216.

THOMAS E. HUCLESS *vs.* JOHN K. CHILDREY.

BRIEF OF WILLIAM L. ROYALL, FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The laws of Virginia license the sale of spirituous liquors and impose a revenue tax upon their sale.

The licenses are for one year or the fractions of it. They are to be taken out on the first of each May and to run until the next May; but if taken out after May they run to the next May.

The act of Assembly regulating the subject is as follows:

CHAPTER II.

License to Sell Liquors as Merchants.

1. Be it enacted by the General Assembly, That no person, club or corporation shall, within the limits of this Commonwealth, sell wine, ardent spirits, malt liquors, or any mixture thereof; alchoholic bitters, bitters containing alchohol, or fruits preserved in ardent spirits, either by wholesale, retail, or to be drunk at the place where sold, or in any other way, without first having obtained license therefor; nor shall such license extend to him the privilege of selling in either way, except in the manner hereinafter provided. A license

to sell by wholesale shall only include the privilege of selling in quantities of five gallons or more, except that wholesale dealers in malt liquors may have the privilege of selling by bottles and jugs in quantities of not less than one dozen. A license to sell by retail shall include only the privilege of selling in quantities not exceeding five gallons at any time to any individual, which shall not be drunk within the house or curtilage where sold, but shall be delivered to the purchaser in bottles, jugs, demijohns, or other vessels, to be removed therefrom. A license to sell to be drunk at the place where sold shall be known as a bar-room license; a license to keep an ordinary or a malt-liquor saloon, as the case may be, under which no wine, ardent spirits, malt liquors, nor any mixture thereof shall be sold to be taken away from the place of delivery, but shall be drunk there. Any person desiring to carry on the business of a wholesale liquor dealer, and also that of a retail liquor merchant, shall obtain a separate license for each, and comply with all the provisions of this act in relation to both privileges. Any person, club or corporation, desiring to carry on the business of a retail liquor merchant, and also that of a bar-room, shall obtain a separate license for each, and comply with all the provisions of this act in relation to both privileges. A violation of the provisions of this section shall be deemed a misdemeanor, and shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and, in the discretion of the court, by imprisonment not exceeding twelve months: provided that nothing in this section shall prevent wholesale confectioners from selling fruits preserved in ardent spirits.

AS A BAR-ROOM.

2. Any person, club or corporation, who desires a license to sell by retail, or to keep a bar-room or a malt-liquor saloon, or to keep an ordinary, shall first apply therefor to the commissioner of the revenue of the city or county in which such privilege is proposed to be exercised, who shall ascertain the amount to be paid by such person, club or corporation, for such privilege, and give them a certificate specifying the same, and, as a condition precedent to the consideration of or the granting of such license, the party proposing to apply for the same shall thereupon make a deposit with

the treasurer or other collecting officer of such city or county, in lawful money of the United States, of the amount so ascertained, and shall take from such treasurer or other collecting officer a receipt for the deposit so made, endorsed on the certificate furnished by the commissioner of the revenue, showing that such deposit, in lawful money of the United States, has been made with such treasurer or other collecting officer; and the applicant for any such license shall thereupon present such certificate, so receipted, to the judge of the county or corporation in which it is proposed to conduct the business; and such court shall thereupon hear such evidence as may be introduced for or against the application, and hear and determine the question of granting the same. It shall be lawful for any person who may consider that he or they would be aggrieved by the granting of such license to have himself or themselves entered and made a party defendant to said application and to defend and contest the same. If the court be fully satisfied, upon the hearing of the testimony for and against the application, that the applicant is a fit person to conduct such business, and that he will keep an orderly house, and that the place at which it is to be conducted is a suitable, convenient, and appropriate place for conducting such business, the court may, upon the execution by the applicant of a bond, in penalty of not less than two hundred and fifty nor more than five hundred dollars, with good security, conditioned for the faithful compliance with all of the requirements of this act, grant such license; and thereupon the commissioner of the revenue shall issue the same in such form as may be prescribed by the auditor of public accounts.

It will thus be seen that in order to sell liquor by the drink—to keep a bar-room—the party desiring to do so must first pay the license-tax to the treasurer, who must give him a receipt. He must then go before the judge of the county or corporation court and prove to his satisfaction that the place where he proposes to open and conduct his bar is one suitable to that business, and he must also prove to the judge's satisfaction that he is a suitable person to conduct that business. It will be seen, therefore, that the treas-

urer's receipt for the license-tax is a prerequisite to the applicant appearing before the judge to make these proofs.

The plaintiff in error desired to open a bar-room in the city of Richmond. He went to the treasurer of the city and offered to pay the license-tax with the State's over-due tax-receivable coupons, and demanded of him that he should receive them and give him the receipt required by the law. The treasurer refused to receive the coupons and refused to give him the receipt demanded, because a law of the State forbade him to do so and required all liquor licenses to be paid in money. The plaintiff in error was unable to proceed further in his effort to take out a bar-room license, and he thereupon sued the treasurer in the United States Circuit Court, upon the ground that said law was repugnant to the Constitution; that the treasurer well knew it to be so; that he refused the coupons maliciously and that he might aid in carrying out a plot to destroy the State's coupons; that the plaintiff was able to prove that he was a proper person to conduct a bar-room business, and that his place of business was a proper place for such business; that the treasurer, by his action, had prevented the plaintiff from opening and conducting his business, and that he had thereby made himself responsible to the plaintiff for all the damages that he had brought on him.

The entire declaration must be read to get a full statement of the case, and, as it is printed in the record, I forbear from stating more of its contents here.

The defendant demurred to the declaration upon the ground that the business of selling liquor is one over which the State has complete control, and she may in her discretion absolutely prohibit it; and, as she can prohibit it, so she may prescribe on what terms it shall be sold. The plaintiff joined in the demurrer, and the case coming on for hearing the court sustained the demurrer and gave judgment against the plaintiff. The plaintiff brought his case here by writ of error.

It is freely conceded that the State may, in her discretion, absolutely abolish the sale of spirituous liquors or prescribe on what terms they shall be sold. That is part of the police power intended for the protection of society. But the State of Virginia does not prohibit its sale. She encourages its sale. She evidently thinks the sale of liquor a practice beneficial to the health and morals of her citizens, and she endeavors to extract from its sale all the revenue that the business will bear.

Now, whilst she may do what she pleases looking to a regulation of its sale, yet, I insist, when she undertakes to raise revenue from its sale, that revenue is as much payable in her coupons as any other revenue, as they are to be received in payment of "ALL TAXES, DEBTS, DEMANDS, AND DUES DUE THE STATE."

Now, it may be argued that the plaintiff, under the authority of *Royall* vs. *Virginia*, might have taken matters into his own hands after his coupons were refused, and have gone on with his business without any license. But he could not have done so. The State, in the proper exercise of her police power, has provided that no one shall sell liquor by retail unless he proves to the satisfaction of the court that he is a proper person and his place a proper place. But the plaintiff could not get to the Judge to prove these facts, because prepayment of the tax and the treasurer's receipt are prerequisites to appearing before the Judge. And note that the plaintiff avers in his declaration that he was a proper person and his place a proper place, and the cause having been adjudged on a demurrer to the declaration, these averments must be accepted as facts. His only redress, therefore, was to sue the treasurer for damages. It is true he might have paid his tax in money, accompanying the payment with coupons, and, after his coupons were verified,

he could have recovered his money. But this court has expressly held, in *Chaffin* vs. *Taylor*, 116 U. S., p. 567, that while he may do so, he is under no obligation to do so, and he may elect to hold the officer who refuses his coupons responsible for the damage caused to him. "His tender, as we have already seen, was equivalent to payment, so far as concerns the legality of all further steps by the collector to enforce payment by distraint on his property. He has the right to say he will not pay the amount a second time, even for the privilege of recovering it back."—*Poindexter* vs. *Greenhow*, 114 U. S., at p. 299.

The defendant clearly, therefore, inflicted an injury upon the plaintiff when he refused his coupons and refused him a receipt. Was it such an injury as an action will lie for?

In discussing this question, care must be taken to discriminate between "injury," "injuria," and "damage," "damnum."

There may be "injury"—that is, a violation of a person's right—without "damage," that is pecuniary loss; as there may be "damage"—that is, a pecuniary loss—without "injury," that is, the right to an action—"*Damnum, absque injuria.*" The distinction is beautifully and clearly discussed by Lord Chief-Justice Holt in *Ashby* vs. *White*, 1 Smith's Lead. Cas., marginal, page 353.

In that case an officer of election had arbitrarily refused to allow a voter to cast his vote for a member of Parliament, and the voter sued him for damages. The point was raised that no pecuniary damage had been done the voter, and the Court of King's Bench held, against the opinion of Holt, Chief Justice, that no action lay. But, upon appeal to the House of Lords, this judgment was reversed and Lord Holt was sustained, and from that time to this Lord Holt's opinion has been accepted by the civilized world, so far as I know, as the true exposition of the law.

At page 357 (marg.) he says:

"My brother Powell, indeed, thinks that an action upon the case is not maintainable because here is no hurt or damage to the plaintiff; but surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; *for a damage is not merely pecuniary, but an injury imports a damage when a man is thereby hindered of his rights.* As in an action for slanderous words, though a man does not lose a penny by reason of the speaking of them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, not so much as a little *diachylon*, yet he should have his action, for it is a personal injury."

The treasurer clearly, therefore, did the plaintiff an injury for which an action lay when he refused to receive his coupons and give him a receipt. What were the plaintiff's damages? I submit that the defendant should have been required to pay the plaintiff what a jury, under all the circumstances of the case, might think it reasonable that he should pay.

The declaration avers that the defendant refused the coupons and the receipt maliciously, and for the wicked purpose of aiding a political party to destroy the State's coupons, and this averment is confessed by the demurrer. This clearly made him liable for punitive damages. Lord Holt says, in the same case, page 359:

"If public officers will infringe men's rights they ought to pay greater damages than other men, to deter and hinder other officers from like offences."

So this Court held, in *Barry* vs. *Edmunds*, 116 U. S. R., p. 550, that the officers of Virginia who recklessly disregard her tax-payers' rights, growing out of a use of her coupons, are liable for punitive damages.

I submit that the judgment should be reversed and a new trial ordered, with directions that if the plaintiff prove his averments, the jury should be instructed that they may allow punitive damages.

WM. L. ROYALL,
For Pl'tff in Error.

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IN THE

Supreme Court of the United States.

THOMAS E. HUCLESS
vs.
JOHN K. CHILDREY,
} No. 1216.

In error to the Circuit Court of the United States for the Eastern District of Virginia.

BRIEF OF R. A. AYERS, ATTORNEY-GENERAL OF VIRGINIA, AND J. RANDOLPH TUCKER FOR DEFENDANT IN ERROR.

The law of Virginia bearing on this case is set out in the brief of plaintiff in error. The declaration of the plaintiff was for damages against the defendant, the treasurer of Richmond, for his refusal to give a receipt to plaintiff according to the law above referred to.

The defendant demurred generally to the declaration, and stated ground for the demurrer. The court sustained the demurrer. For this action the writ of error was awarded. The decision was right.

1st. The declaration is bad on general demurrer.

2d. It is bad for the reason alleged in the demurrer. In Royall *vs.* Virginia, 116 U. S., 572, the court held Royall to be a licensed attorney, and the license-tax to be merely a tax and not a license at all, and hence he could proceed to practice under his license, after tender of coupons. In this case plaintiff had no license to pursue his business as bar-keeper. It was *in fieri* dependent on judicial

action, which could not be asked for until plaintiff paid a sum of lawful money for the privilege, and brought a receipt for it to the court. The tax was not on the privilege of bar-keeper, for he never had it; he could only obtain it on the fee condition of paying the money to the treasurer. That pre-condition the State prescribed. She could have forbidden any such business; she could condition it as she pleased, and did so; she could make it a privilege to be paid for and determine the medium. It is not doubted if a debtor of the State waived the privilege of paying in coupons, he would not be bound to pay money just as in a contract for gold, the obligor waives solution in legal tenders. Trebilcock *vs.* Wilson, 12 Wall., 457; Bronson *vs.* Rodes, 7 Wall., 229.

This law was in substance that all men may take out this license, (if court allows) on condition of waiving payment of tax in coupons. Could not the State do this? It does not operate on an existing debt, but fixes this mode of payment as a *term in contract to be made.*

3d. Defendant as ministerial officer, could not give any receipt, not consonant with his powers; he could only receive money. He could give receipt for nothing but money. How can he be personally liable for not violating the letter of his authority? He did not exact money. He said "I am authorized to receive and give receipt for money, and no further. I am not authorized to receive coupons, and I cannot; if I did, I would falsely receipt for money." *Respondeat superior.*

4th. This action claims to hold an agent responsible for not doing what the principal should have authorized him to do, but in substance forbade him to do. It seeks to make him liable because he did not decide the law under which he was acting to be unconstitutional; and more than this, because he not only did not annul this unconstitutional law, but did *enact* one authorizing himself to receive and receipt for coupons, and making that sufficient for judicial action. We need not say that Chaffin *vs.* Taylor, 114 U. S., and 116 U. S., 567, does not all go to this extent. In that case, after tender of coupons, the officer levied and thus was held a trespasser. In this case, Childrey simply said "I cannot do what I am not authorized to do, nor falsely declare I received money, when I only received coupons; I simply refrain from doing." How can a case which held an officer liable for a *positive* trespass rule this case where the officer did nothing?

5th. The coupons were not tenderable here, for there was no debt

due until privilege was granted by the court. Whether Hucless, having received the license and paid money, might not have a claim, is a question which is not before the court.

6th. Ashby *vs.* White, cited for plaintiff, was a denial of a fixed right. This was merely an existing one on a condition prescribed by law, which bound the officer, and he could not change it.

Respectfully submitted,

R. A. AYERS,
Attorney-General of Virginia.

J. RANDOLPH TUCKER.
For defendant in error.